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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 607.

MILDRED L. MILLER, individually and as Administratrix of the goods, chattels and credits of JAMES W. MILLER, deceased,

Petitioner,

v.

FARRELL LINES INCORPORATED,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

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Statement of the Case.

This is submitted in opposition tc a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit which affirmed the judgment of the United States District Court for the Southern District of New York, directing a verdict for the respondent after a jury verdict was returned in favor of petitioner.

This action was brought to recover damages for the death of James W. Miller on November 14, 1950, while employed as an Assistant Electrician aboard the SS. *African*

References:

The stenographic transcript of the testimony—"(T.).)"

Glade, owned by the respondent. The complaint, although it set up only one cause of action, actually contained what will be referred to as two separate counts:

1. A violation of the duty to restrain or safeguard the decedent on the basis of alleged signs of mental instability which could have reasonably led the Master to believe he would do harm to himself.

2. A violation of the duty to rescue or to take proper and efficient means to do so after it was known that the decedent had gone overboard.

A motion was made by respondent for a directed verdict at the close of the petitioner's case (T. 506-536). The Court reserved decision (T. 548). This motion was renewed at the close of the whole case (T. 793-837), on which decision was also reserved (T. 837-838).

At the conclusion of his charge, the Court submitted two questions to the jury and also requested that the jury bring in a verdict for the plaintiff or the defendant.[1]

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[1] The Court: Now, Court's Exhibit 3 consists of two questions and a form of verdict.

The first question is this:

"Did Miller's conduct aboard the SS. *African Glade* between November 10, 1950, and November 14, 1950, manifest signs of instability which could reasonably have led the Master or his associate officers or Chief Electrician Levy to believe that there was danger that he might do harm to himself?"

You will please answer that question yes or no.

The second question, which is in two parts, and which you should also answer yes or no, is as follows:

"Upon being notified that Miller had disappeared from the SS. *African Glade* at 10:20 A. M. on November 15, 1950:

"(a) Was James W. Miller alive at that time?

"(b) Did Captain Wilder, the Master of the ship, take all proper and efficient means to effect a rescue?

"Third: In addition to answering the above questions, please report your verdict as follows:

"For defendant or For plaintiff,"

and then in the event the verdict is for the plaintiff there

The jury answered the first question "No." The (a) part of the second question, as to whether the decedent was alive at 10:20 a.m. on November 15, 1950, was answered "Yes" and the (b) part, as to whether the Master had taken all proper and efficient means to effect a rescue, was answered "No." The jury gave an award of $10,000 to the widow and $45,000 to the child.

As soon as the jury was discharged, counsel for the defendant renewed his motion for a directed verdict made at the close of the petitioner's case and at the close of the whole case.

The Court thereupon granted the motion, set aside the verdict and directed a verdict for respondent.

The petitioner, in her appeal to the Circuit Court of Appeals, abandoned the first count relating to the duty of respondent to restrain or safeguard the decedent and did not appeal from the jury's determination of this question.

This is a suicide case. Paragraph 7th of the complaint reads:

> "That on or about the 14th of November, 1950, while plaintiff's decedent (that means Miller) was lawfully on board said vessel he was caused to be washed overboard solely by reason of defendant's negligence. The defendant, its agents, servants and employees, officers and crew members were reckless, careless and negligent in failing to maintain a proper and adequate guard and watch over plaintiff's dece-

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are three subdivisions and your verdict may be divided into any one or all of those three subdivisions as you see fit.

"(a) Amount, if any, awarded for the pain and suffering of James W. Miller.

"(b) Amount, if any, awarded for the pecuniary loss to the widow.

"(c) Amount, if any, awarded for the pecuniary loss to the child."

I hand this to the foreman of the jury and the marshals may now be sworn and the jury retire.

dent when they knew or should have known of his disturbed condition, in failing to take adequate and necessary steps to have him relieved from his duties, in failing to render adequate, prompt and proper medical aid and attention, and in failing to take all adequate, proper and necessary steps to conduct a search for him after he went overboard, as a result of all of which he was lost at sea and died on the 14th day of November, 1950." [T. 852]

The Trial Judge in his charge, after quoting Paragraph 7th of the complaint, said:

"Let us look at the proof in the case. There is no proof that he was washed overboard, so you can forget that. There was no claim that he was not given adequate, prompt and proper medical aid and attention. But there is a claim—and the charge made by the plaintiff in this case is a charge directed very largely against Levy, the chief electrician, because the plaintiff says, in effect, 'You, Farrell Lines, through the captain, through the officers, but through Levy (and Levy is the responsible pivot upon which they base their claim), you failed to maintain a proper and adequate watch over James W. Miller when you knew or should have known of his disturbed condition.

"That is the first charge that the plaintiff has sought to prove in this case.

"What does disturbed condition mean? It means that Miller was either insane or on the periphery of being insane; that he was mentally sick. That is what they mean.

"They might have said so, but that is another way of saying so. And when they say 'You didn't maintain a proper watch over Miller because he was disturbed, and you should have known that he was disturbed,' what would be a little more concise and practical way of expressing that in this case? Well,

it is tantamount to their saying—and that is what the plaintiff in this case is urging you to find—that Miller was so disturbed that he took his own life and that the captain or responsible members of this crew knew or should have known that he was going to commit suicide.

"There is no proof of any accident. If there were proof of an accident, it would be the burden of the plaintiff to prove it and there hasn't been one word said about any accident.

"If there were an accident, the plaintiff would have to go further and show that the defendant was responsible for the accident, and there hasn't been one word of proof with respect to that.

"The whole theory of this case in behalf of the plaintiff is, 'Miller was mentally disturbed. Miller took his life because he was mentally disturbed. You should have known of it before he took his life, and because you should have known of it and didn't take adequate and proper steps, you are responsible to us in law and must pay us damages.'" [T. 853-854]

Preliminary Comment Concerning the Petition.

The petitioner in her petition ignores completely the basis upon which the Trial Court directed a verdict for the respondent with which direction of a verdict the Circuit Court of Appeals agreed. The petitioner on page 9 of her petition stated, "The Court of Appeals finds that the Master of the vessel performed an efficient rescue." This is a misstatement. Neither the Trial Court nor the Circuit Court of Appeals passed on this question. The Trial Court, in granting the motion for a directed verdict, said:

> "I feel that there is no proper basis for the establishment of any causal relationship between the alleged negligent search and the death of the decedent." [T. 899]

The Circuit Court of Appeals said:

> "Immediately after the verdict, Judge Palmieri granted the defendant's motion for a directed verdict on the ground that there was no proper basis for the establishment of any causal relationship between the alleged negligent search and Miller's death. We agree."

ARGUMENT.

POINT I.

There is no probative evidence in the case to establish any causal relation between the alleged violation of the duty to take proper and efficient means to effect a rescue and the death of the decedent.

It is undisputed that there was no duty to rescue prior to 10:20 a. m. on November 15, 1950, at which time the Master was notified of the disappearance of the decedent. The Trial Judge in his charge regarding the search had this to say:

> "Let us get to the adequacy of the search because that is the second basis upon which the plaintiff claims that she is entitled to collect from the Farrell Lines in damages, and here again I don't want to repeat it, but it is so important: She has the burden of proving by a fair preponderance of the evidence that the defendant failed to take all of the adequate, proper and necessary steps to search for Miller after his disappearance. She also has the burden of proving by a fair preponderance of the evidence that because of the inadequacy or impropriety of that search Miller died.
>
> "The normal rule is that proper and efficient means should be taken to effect a rescue of a seaman who has fallen overboard. It is pretty clear from

this case that no one on the vessel knew that Miller had left the ship until the morning of November 15th, and only after the vessel had been carefully searched —I believe that was at 10:20—when the ship was turned around, put on a reverse course, was a sea search undertaken.

"A great deal of time has been spent in this case on the question of whether or not the ship was properly handled from this time forward. Here again there is a very serious question of causal relationship between the alleged failure on the part of the master and crew to conduct a proper and adequate search and the disappearance or death of Miller.

"You have to decide which of the expert testimony you wish to believe as to whether or not a proper and adequate search was conducted. But you also have to be satisfied that the plaintiff has sustained the burden of proving by a fair preponderance of the evidence that this search, even assuming that it was inadequate, was the proximate cause in whole or in part of the death at sea of James W. Miller.

"In other words, ladies and gentlemen, if you believe—and you are entitled to believe it from the evidence in this case—that Miller committed suicide by jumping from the railing of the main deck during the night of November 14th to 15th, and that he was already dead at the time the ship was turned around, then the plaintiff cannot prove that part of case, because if he was already dead at the time the defendant undertook its sea search, it didn't make any difference what kind of a search they conducted. Since he was already dead their search could not have saved him. The search would have been subsequent to the death and could not have been the cause of the death.

"So that if you believe that Miller was dead at that time, when they turned the ship around and started the search, it makes no difference how they

conducted the search because they couldn't have saved Miller in any event. *It has to be the proximate* cause of the disappearance or death. It is not the proximate cause of the disappearance or death if Miller was already dead because the search was subsequent to it.

"I hope I have made that clear because it is an extremely important consideration in this case. In other words, to put it differently, you have got to be satisfied that Miller was alive at the time the defendant's responsible employees knew of the disappearance and undertook the search; that the search was inadequate and improper and that there was a direct causal relationship between the inadequate search and the disappearance or death of Miller." [T. 872-875]

The attorney for petitioner took no exception to this portion of the charge nor, in consenting to the questions put to the jury, did he raise any question as to the time being stated as 10:20 a. m., when the rescue should have been started.

It is also undisputed that the decedent was last seen alive at 11:30 p. m. on November 14, 1950, pacing the deck adjacent to No. 4 hatch.

There was no testimony adduced to show that Miller was alive at 10:20 a. m. on November 15, 1950. There was no evidentiary basis upon which the jury could draw an inference that Miller was alive at 10:20 a. m. The Court, in its charge, told the jury that they could not find for the petitioner for failure to make proper rescue efforts unless they first concluded that Miller was alive at 10:20 a. m. on November 15, 1950.

We have the period of time from 11:30 the night before, until 10:20 a. m. at some moment of which Miller left the ship. It is quite probable that it was prior to 6:00 a. m., when daylight set in and at which time men who were up and around would have seen him. Whether it was shortly

after 11:30 p. m. or shortly before 6:00 a. m., how can anyone with reason say that Miller was alive at 10:20 a. m.

It must constantly be borne in mind that petitioner had the burden of proving that the decedent was alive at 10:20 a. m. and that respondent had no responsibility as to rescue until that time. The record is completely barren of any evidence that Miller was alive at that time. The overwhelming probability is that he was dead hours before the time when respondent was obligated to commence rescue efforts.

In order to find that Miller was alive at 10:20 a. m., the jury had to indulge in the following series of speculations:

(1) That Miller changed his mind about committing suicide after entering the water.

(2) That, if Miller left the ship where he was last seen, a distance of 20 or 25 feet to the water, aft of midship, he was not drawn into the propeller.

(3) That Miller was able to swim—since no evidence was given that he could swim.

(4) That Miller was able to stay afloat for 22 hours or possibly another 12, depending on the time he went overboard, or at least five hours, if it be surmised that he went overboard shortly before daylight.

If we are allowed to speculate, the only reasonable conclusion we can come to is that Miller was dead at 10:20 a. m. It cannot be said, with reason, that Miller was alive at that time and that he died subsequently because of improper rescue efforts. Such a conclusion does violence to our reason and common sense. There is utterly no basis on the evidence, with reason or common sense, that the rescue efforts contributed in whole or in part to the decedent's death.

We are dealing with a very fundamental concept—that no man can be held responsible for his negligence unless it caused the injury. In 33 Harvard Law Review in an article by Professor Joseph H. Beale, entitled, "The Proximate Consequences of An Act," he writes at page 637:

> "Starting with a human act, we must next find a causal relation between the act and the harmful result; for in our law—and, it is believed, in any civilized law—liability cannot be imputed to a man unless it is in some degree a result of his act. Imposition of liability, even that which seems most extreme, is yet based upon a causation by the defendant's act. Thus, liability of the owner for default of a pilot forced on him by a compulsory pilotage law is based ultimately upon the owner causing his vessel to enter port; liability for nuisance, however drastic, may be traced to the ownership of land; and liability of an employer under the Workmen's Compensation Act grows out of his carrying on the business.
>
> "Where the act is the failure merely of a legal duty, causation is established only when the doing of the act would have prevented the result; if the result would have happened just as it did whether the alleged actor had done his duty or not the failure to perform the duty was not a factor in the result, or, in other words, did not cause it. Two typical applications of this principle may be given. In *Regina* v. *Dalloway*, it appeared that while defendant was driving carelessly, with the reins out of his hands, a child ran in front of the horses and was killed. Erle, J., charged that if by the utmost care on his part he could not have prevented the accident he must be acquitted. So where it was the duty of defendants to fence a hole they had cut in the ice of a lake, and plaintiff's horses ran away and were drowned through the hole, it was held that if any fence which defendant was obliged to build would not have stopped the runaways the defendant's failure was not a cause of the accident.

"This principle is illustrated by several recent cases. In *Piqua* v. *Morris*, the embankment of defendant's reservoir broke away and the water injured plaintiff's land. The defendant had negligently failed to construct a sufficient spillway; but it appeared that the flood on this occasion was so extraordinarily great that a sufficient spillway would not have saved the embankment. The city's negligence was held not to be a cause of the loss. So in *Ford* v. *Trident Fisheries Co.* where Ford, the mate, fell from the defendant's vessel and never rose to the surface, and the ship's boat was negligently lashed to the deck so that it could not be seasonably launched and used, it was held that, in the absence of evidence of the possibility of saving Ford, causation by the defendant had not been proved."

In *Hutchinson* v. *Dickie*, 162 F. 2d 103, the decedent fell from a cabin cruiser while on a pleasure cruise on Lake Erie. It does not appear how the decedent came to fall into the water. The Court below found that the owner of the yacht was negligent in backing the boat instead of turning her about. The Court of Appeals reversed and said in part:

"Further, we think an unsurmountable objection to the judgment in appellee's favor is the entire lack of evidence that anything appellant did or left undone caused his efforts at rescue to fail. It does not appear that if appellant had turned the cruiser instead of backing it, Dickie would or should have been saved. *Ford* v. *Trident Fisheries Co.*, 232 Mass. 400, 402, 122 N. E. 389."

In *Lavender* v. *Kurn*, 237 U. S. 645, 90 L. ed. 916, the Supreme Court said:

"It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-

> minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

This quotation appears in petitioner's brief. This quotation, instead of supporting petitioner's contention, is authority for the proposition that where there is a complete absence of probative facts to support the conclusion reached, the verdict cannot stand and that there must be an evidentiary basis for the jury's verdict. In the case at bar there is no evidentiary basis whatsoever from which an inference can be drawn that Miller was alive at 10:20 a. m. on November 15, 1950.

In *Schulz* v. *Pennsylvania Railroad Co.*, 350 U. S. 523, the decedent, who was employed as a tug fireman, was assigned to work on four tugboats, docked side by side at Pier "H", Jersey City. Three of the tugboats were unlighted and one was partially illuminated by spotlights from the pier. The Court below directed the verdict for defendant on the ground that the decedent might have fallen on a spot where there might have been no ice or that he might have fallen from the one boat that was partially illuminated by shore lights. The Supreme Court held that reasonable men could find from the discovery of Schulz's half-robed body with a flashlight gripped in his hand, that

he slipped from an unlighted tug as he groped about in the darkness attempting to perform his duties. The opinion of the Court reads in part as follows:

> "In this case petitioner is entitled to recover if her husband's death resulted 'in whole or in part' from defendant's negligence. Fairminded men could certainly find from the foregoing facts that defendant was negligent in requiring Schulz to work on these dark, icy and under-manned boats. And reasonable men could also find from the discovery of Schulz's half-robed body with a flashlight gripped in his hand that he slipped from an unlighted tug as he groped about in the darkness attempting to perform his duties. But the courts below took this case from the jury because of a possibility that Schulz might have fallen on a particular spot where there happened to be no ice, or that he might have fallen from the one boat that was partially illuminated by shore lights. Doubtless the jury could have so found (had the court allowed it to perform its function) but it would not have been compelled to draw such inferences. For 'The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable'. Fact finding does not require mathematical certainty. Jurors are supposed to reach their conclusions on the basis of common sense, common understanding and fair beliefs, grounded on evidence consisting of direct statements by witnesses or proof of circumstances from which inferences can fairly be drawn.
>
> "We think the evidence was sufficient to require submission of the case to the jury, and that it was error not to do so."

In the language quoted, this Court held that the conclusions must be grounded on evidence consisting of direct statements by witnesses or proof of circumstances from which inferences can be drawn. The difficulty of apply-

ing the *Schulz* case to the case at bar arises in that in the *Schulz* case there was evidence of negligence from which an inference could be drawn, that the decedent fell from one of the unlighted tugs. There is no evidence in this case from which an inference can be drawn that Miller was alive at 10:20 a. m. on November 15, 1950. There is also one other distinction between the *Schulz* case and the case at bar in that in the *Schulz* case it was conceded that Schulz met with an accident and did not commit suicide, whereas in the case at bar, the case was tried on the theory that the plaintiff did commit suicide and the possibility of an accident was excluded.

In *Johnson* v. *New York, N. H. & H. R. Co.*, 194 F. 2d 194, the decedent had been employed on the defendant's tug as a floatman. He met his death by drowning while the tug was removing two carfloats from a yard on the East River. There was no eyewitness to the accident and it was not known that the decedent had drowned until after the tug had completed its maneuver. There were two questions raised on the appeal.

1. Whether there was adequate proof of the defendant's negligence and

2. Whether, if negligence was proved, there was proof that such negligence caused the decedent's death. The opinion of the Court of Appeals reads in part as follows:

> "Even on the assumption that the custom existed and was violated, the judgment can be supported only if the evidence justified a finding that the violation had a causal relation to Johnson's death. When last seen alive he was walking toward the bow of float 53. It is a legitimate inference that he went ashore, crossed over to the 58 and had at least loosed the short rack line since the float was pulled out without

breaking it. To get into the water he must either have fallen or jumped. Conceivably after loosening the line he may have attempted to jump to the apron of Bridge 12 in order to remain ashore until the tug should return. Capt. DeMars testified that it is not unusual on such a short maneuver for a floatman, when he lets his line go, to jump ashore. However, since Johnson's duty was to remain aboard and tie together the bows of the floats, we think it a more reasonable inference that he accidentally fell from the 58. But what caused him to fall seems to us wholly conjectural. The plaintiff argues that the jury could infer that while he was loosening the rack line, the tug started to pull the float out before he expected, causing him to lose his footing and strike his forehead in some way that knocked him unconscious and threw him overboard. But the supposition that the tug started pulling out the float before he expected, presupposes that he did not shout the signal 'all gone.' The appellee argues that a bridgeman may have shouted 'all gone' when he released one of the long rack lines, but no witness observed any bridgeman in the neighborhood. It was Johnson's duty, not the duty of a bridgeman, to give the signal when the short rack line was free, and the assumption that some one other than Johnson gave it at that precise moment seems to us pure conjecture. It is at least equally reasonable to infer that Johnson did give the signal for the tug to start and thereafter stumbled or for some other unknown cause fell and knocked himself unconscious. The record is a complete blank as to how or why he fell overboard. It is of course true that not always must a jury's verdict fall if it involves speculation and conjecture. As stated in Lavender *v.* Kurn, 327 U. S. 645, at page 653, 66 S. Ct. 740, 744, 90 L. Ed. 916, when 'the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose

duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear.' In the case at bar we think there was a complete absence of probative facts to support the conclusion that Captain O'Brien's failure to send a man to see where Johnson was when the 'all gone' signal was heard caused his death. On the issue of causation the plaintiff had the burden of proof. In our opinion the motion for a directed verdict should have been granted. Accordingly the judgment is reversed."

This case was appealed to this Court on a technical ground, sent back for a new trial. On a second trial, the jury again brought in a verdict, which was set aside by the court. The Court said, in its opinion, (*Johnson* v. *Palmer*, 129 F. Supp. 202, affirmed 220 Fed. 2d 279 on the opinion of the Court below):

"In reversing the judgment and verdict in the first trial, the Court of Appeals was of the opinion that the lack of any probative facts as to how or why Johnson fell overboard required the conclusion that the plaintiff had failed to sustain the burden of proof on the essential issue of causation. No facts were presented in this trial which would serve to remedy this lack of evidence. There is testimony that there was oil on the deck of Carfloat No. 53 near the stern. This seems to be the basis in fact for plaintiff's contention that the defendant failed to furnish the plaintiff's intestate with a safe place to work. Of course, the contention that Johnson might have slipped on this oil and fallen into the water cannot be tied in with the plaintiff's theory that Johnson might have fallen from the bow of Float No. 58, since the oil was on Float No. 53 and not Float No. 58. Furthermore, the evidence shows that Captain O'Brien saw Johnson walking forward on

> Float No. 53 towards the bow about half the length of the float on his way to release the short rack lines. Thus he was seen on the float beyond the place where the oil was found. In addition there is testimony by Gaglio and O'Brien, uncontradicted, that Johnson never got into the oil as he was walking forward toward the bow of Float No. 53."

This Court denied a writ of certiorari in this case on June 6, 1955. It may also be noted that the writ of certiorari was granted in the *Schulz* case on November 7, 1955 by the same Court. In the *Johnson* case, it was attempted to be proven by testimony that there was oil on the deck of *Carfloat No. 53,* which the Court held could not be tied in with the plaintiff's theory that the decedent had fallen from the bow of *Carfloat No. 58.* The Court also stated that the evidence showed that the decedent was seen walking forward on the carfloat beyond the place where the oil was found.

In the case at bar there was no evidence that, if Miller had gone over the side at 11:30 p. m., that he would have been alive at 10:30 a. m. and moreover, no testimony was offered by the petitioner. On the contrary, on the cross examination of Captain Feinne, petitioner's expert, the following question and answer were given:

> "Q. Captain, there is no possibility whatsoever that Miller could have been afloat from 11:30 the night before until that time, is there? A. I don't know. I don't know and you don't know either. Nobody knows" (T. 427).

The petitioner relies on the case of *Rogers* v. *Missouri Pacific Railroad Co.,* 352 U. S. 500 to support the proposition that the alleged negligent search played a part in the death of petitioner's decedent, and quoted as follows from the opinion:

> "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence. Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer *played any part* at all in the injury or death. Judges are to fix their sights primarily to make that appraisal and, if that test is met, are bound to find that a case for the jury is made out whether or not the evidence allows the jury a choice of other probabilities. The statute expressly imposes liability upon the employer to pay damages for injury or death due 'in whole or in part to its negligence.'" (Emphasis added.)

It is respondent's contention that the alleged negligent search did not play "any part, *even the slightest*" in causing the death of decedent, and that his death was not caused "'in whole or *in part* to its negligence.'"

We think this case comes within the class "where fair-minded jurors cannot honestly differ whether fault of the employer played any part in the injury" (*Rogers* v. *Missouri Pacific R. R. Co., supra*, at page 501).

In holding that the petitioner did not introduce evidence of any probative facts to show that the respondent's negligence played any part in Miller's loss of life, the Circuit Court of Appeals cited *Rogers* v. *Missouri Pacific R. R. Co., supra*, as authority for the proposition that "it is necessary to show that the allegedly negligent act or omission of the defendant caused, in whole or in part, the damage for which recovery is sought."

POINT II.

All reasonable, proper and efficient means were used to effect a rescue after it was known that the decedent had disappeared.

The Trial Court, in granting the motion for a directed verdict, did so on the basis of lack of causal relationship between the alleged negligent search and the death of decedent. The Court did not pass on the question as to whether the evidence was sufficient to justify the jury's finding that the search was negligent. Although the question was raised in respondent's brief in the Circuit Court of Appeals, it was not passed upon.

The facts as to the search are not in dispute. The only factual testimony was given by respondent's witnesses. The testimony offered by the petitioner was that of an expert, Captain Feinne. The crux of his testimony was that the Master should have returned to the position where Miller was last known to be alive (T. 349). This was petitioner's basis for the contention that the search was negligent. We consider this proposition untenable and that we can prove scientifically that this is so.

As soon as the Master was advised at 10:20 a. m. on November 15th that Miller had disappeared, he immediately questioned those who would have reason to know about it and also ordered an immediate search by department heads of the vessel. This was done by each department head with searching parties from his department (T. 77-79, 89). At 10:30 a. m. he turned the ship about by making a 270° turn and headed the bow of his ship back into the wake from which the stern had just emerged and put her on a gyro course of 298° which was the reciprocal of the gyro course of 118° which the ship had been steering. The ship had been on a gyro course of 118° from noon on November 14th, the day

before (T. 79-81, 89, 107). Lookouts were posted about the ship. The Master communicated by radio telephone with the United States Coast Guard *Weather Ship E* which was in the vicinity. He also radioed the office of the company in New York. The search was continued until 5:16 p. m. when darkness set in and the ship then resumed her course of 118° by gyro (T. 79, 87, 111).

These were the facts as testified to by the Master, Captain Arthur T. Wilder, and by the Navigator, Captain Robert J. Ware. The testimony of Captain Wilder was taken by deposition by the defendant and read into the record by the plaintiff as part of her case. Captain Wilder at the time of the trial was employed as a pilot by the United States Government on the Panama Canal and arrangements could not be made for his attendance at the trial. Captain Ware, who had not been employed by the defendant for more than two years, testified on behalf of the defendant. No factual testimony was offered by the plaintiff. The entire case of plaintiff, as to the rescue, was based on the testimony of plaintiff's expert, Captain Theodore I. Feinne.

The plaintiff's case is based upon an answer to a hypothetical question by Captain Feinne that, in his opinion, the Master did not make a competent and efficient search. The claims of negligence appear to be:

(A) That the Master had not reversed course on a reciprocal course but had reversed course on a parallel course and was twelve to thirteen miles south of a reciprocal course;

(B) That the ship never returned to its position at the time when the man was last known to be alive aboard the vessel;

(C) That he did not get a fix at 10:20 a. m. or a couple of minutes later on November 15th;

(D) That the Master did not take into account wind or set of the current;

(E) That the Master should not have given up the search when darkness set in at 5:16, but should have remained in the area until daylight and resumed the search;

(F) That the master could have used swivel lights that might have shown out 25 to 100 feet on the water;

(G) That the Master only communicated with the U. S. Coast Guard Weather Ship once and did not radio other vessels;

(H) That the Master did not interview every member of the crew and every one of the passengers;

(I) That the Master did not request any instructions from his home office as to how to proceed.

The answers to (A), (B), (C) and (D) have to do with the method of search and will be discussed together.

The vessel had taken leave from Ambrose on November 10th on a course of 106° true by gyro. This course was changed on Tuesday morning, November 13th, at 6:30 to 112° true by gyro. On November 14th at noon the course was again changed to 118° true by gyro, which was the course the vessel was on at 10:20 a. m. on November 15th [115a, 116a].

Upon being notified of Miller's disappearance, the Master turned the vessel about by making a 270° turn, and headed the bow back into the wake from which the stern had immediately come out of. He put the vessel on a course of 298° which was the reciprocal of the course of 118° which the vessel had been on from noon of the day before. The testimony of Captain Wilder is clear that he did not make a "U" turn, but that he did get back on a reciprocal course. The testimony of Captain Ware, who was the Navigator,

is even more specific. He not only testified that the vessel made a 270° turn, but that the bow of the ship headed into its wake and that he was able to see the wake. This was reiterated throughout the direct testimony of Captain Ware and also on cross examination. This testimony is uncontradicted.

The issue as raised by the testimony of plaintiff's expert, Captain Feinne, may best be illustrated by the chart which he prepared and which was introduced as Petitioner's (plaintiff's) Exhibit No. 34. A copy of this chart is appended to this brief. [Ap. 2a]

On this chart, Captain Feinne plotted the course which the vessel was on just prior to Noon, November 14th, which was 112° by gyro, which he designated as (1) on the chart. He then charted the position of the ship as given in the log as of Noon, November 14th, when the course was changed to 118° by gyro, which he designated as (2). He next plotted the approximate position of the vessel at 11:30 p. m., November 14th, when Miller was last seen as designated (3). He next charted the position of the vessel at 10:20 a. m. on November 15th, designating it (4). He did this by taking the Noon position in the log book as of Noon, November 15th, designated (5) and running it back to 10:20 a. m. He next plotted the position of the vessel at 5:16 p. m. on November 15th which he designated (6). He also set forth the position of the Coast Guard Weather Ship E, which he designated (7). He then appended a note to the chart (8) in which he said:

> "NOTE. All data shown on this chart taken from log book of SS. *African Glade*—from pos. fixes Noon November 14-Nov. 15. Vessel was making a course of 120° true. Vessel was being set to south. Official current chart for Nov. for this area shows this south set."

Captain Feinne further stated that although the vessel was steering 118° by gyro, it was making good over the land 120° true (T. 460, 461).

He further stated that the vessel, when she was turned around at 10:20 a. m. on November 15th, was on a parallel course and not on a reciprocal course and that instead of a reverse course of 298°, it should have been 300°, and that the vessel should have returned to the point on the earth's surface where Miller was last known to be alive. In this, the petitioner's expert committed grievous error. This can be proved by an analysis of the expert's own chart, Petitioner's (plaintiff's) Exhibit No. 34.

The vessel which had been on a 118° course by gyro from Noon on November 14th, was being set to the south. This is from Captain Feinne's note (8) on his chart, Petitioner's (plaintiff's) Exhibit No. 34. When Miller left the vessel at 11:30 or subsequently, he did not remain in the same spot but was also set to the south by the current, the same as the ship. Current is movement of the water and everything in the water moves with it. Although the vessel was steaming away from Miller when he left the ship, the relative positions of the ship and Miller remained the same. When the ship took a reverse course of 298° and headed back into her own wake, she was affected by the same southerly set going out as she had coming back. Likewise, if Miller was afloat, he was being set further to the south to the same degree.

The contention that the vessel should have gone back to the geographical point where the ship was when Miller was last seen at 11:30 p. m., November 14th, is patently erroneous. It is clear that to have reached that point the ship would have had to steer 302° instead of 300° as suggested by Captain Feinne in order to account for the set to the south going back. In the meantime, Miller would have been

carried southerly another two degrees, assuming that Captain Feinne was correct in his opinion that, although the vessel had been steering 118° by gyro, it had been making 120° good over the ground.

The testimony of the Master, Captain Wilder, and Captain Ware, the Navigator, and of Captain Thomas I. Sheridan and Captain Charles E. Umstead, the two experts who testified for the defendant, was that the ship should not have returned to the point on the earth's surface where the decedent was last known to be alive. This was based on their opinion that, when he went overboard, if he remained afloat, he did not remain in the same geographical position, but was affected by the wind, set and current to the same extent as the vessel. The opinion was that only by the ship going back in its wake would there be any possibility of coming upon the decedent, if he were still afloat.

It was repeatedly asserted by Captain Ware and by Captain Sheridan and Captain Umstead, that it made no difference geographically where the decedent went overboard or where the vessel was at 10:20 a. m., but that the important thing was the relative positions of the decedent, if he were still afloat, and the vessel. Captain Sheridan, defendant's expert, testified that current was the movement of the water and that with the wind and the set, the whole water moved carrying both the ship and the man and that the relative positions of the two did not change.

The experts for the defendant testified that not only was the method of search used by the Master of the vessel correct but it was the only possible means he could have used and that to have taken a course back to the geographical position or the latitude and longitude where the man was last seen would have been an improper method of search. The plaintiff's witness, Captain Feinne, did admit

that the vessel and the man would have been affected to the same extent by the wind and the current. He also admitted that, if the vessel had headed back into her wake, the ship would have been on a reciprocal course, then he became confused, but he said that couldn't have been so, although Captain Ware specifically testified that he had seen the wake and that the bow of the ship had headed into it. Captain Feinne testified that the ship could not have headed into her wake because he contended that the course made good over the ground from noon to 10:20 a. m. was 120° true, although the vessel had been steering 118° true by gyro. The expert for the defendant as well as Captain Ware contended that the course made good over the ground made no difference for the reason that, in reversing the course, the same conditions of wind and set would have affected the vessel on a reverse course as it would on her course coming down. They testified that they did not know if the ship had been making a true course over the ground at 120° and it didn't make any difference. Captain Feinne persisted in his error and contended that in going back, the ship should have been put on a course of 300° instead of 298° to offset what he contended was the difference between the steering course of 118° and the 120° made good over the ground.

The contention of Captain Feinne was that the vessel should have gone back to the geographical point where the decedent was last seen and then commence a search. He also contended that the Master should have steered a course back of 300°, which, in his opinion, would have been the course made good over the ground on the bottom of the ocean. This Court would seem to be able to take judicial notice of the fact that at 11:30 p. m. or whatever subsequent time the decedent went overboard, the decedent did not remain in the geographical position where he went over-

board, but was deflected by wind and current as was likewise the vessel to the same extent.

Even if it be assumed that the contention by Captain Feinne, plaintiff's expert, that the ship should have taken a reverse course of 300° and gone back to the point on the earth's surface where the decedent was last known to be alive, there is an insurmountable objection to his contention. Captain Feinne testified that the vessel, from noon the day before, had been making a course good over the ground of 120° true, although it had been steering 118° true. This testimony was based entirely on the positions given in the log book for noon, November 14th, and for noon, November 15th. Captain Feinne repeatedly referred to these positions as fixes. There is no evidence that these positions were other than dead reckoning positions. The evidence in the case is that the vessel took leave from Ambrose on a gyro course of 106°, which was changed to 112° on Tuesday and changed at noon on November 14th to 118° true by gyro. The logbook shows that from the time the vessel left New York, it was partly cloudy and overcast. There was nothing to indicate that the vessel's position was ascertained at any time by fixes. The probability is that the ship was proceeding by dead reckoning from the time she left New York. On the basis of dead reckoning, the ship's position at any time shown in the log would be the course times the speed of the vessel. On this basis, no allowances would be made for wind, current or set or errors in steering. These errors could only have been corrected if at any time an opportunity had been offered to take a fix by observation of celestial bodies. The testimony of Captain Ware is that he does not recall that he was able to take any fixes on November 13th, 14th or 15th (T. 640-642).

As to (H) there was no reason why the Master should have interviewed every one aboard the vessel. The only persons who had any knowledge regarding Miller were interviewed. The only facts regarding Miller were given by Levy and Aiken and nothing further developed at any subsequent time. When the Master had all department heads search the vessel, it must be assumed that the head of each department asked the men in his department if anyone had seen Miller. This was necessarily so when they were taking part in the search. It is only reasonable to assume that, if anyone had any information, he would have come forward. The Master of the vessel properly directed the search instead of taking the time to interview all persons aboard.

As to (G) the Master communicated with the U. S. Coast Guard Weather Ship by radio telephone and not by telegram as stated in petitioner's brief. (Radio telephone was used not telegraph (T. 96)). Captain Feinne agreed that the Coast Guard would relay the message to all ships and that this would be the best way because the Coast Guard vessel had more frequencies (T. 421-424) (T. 737-738).

As to (I) the answer is that, although he advised the home office of the disappearance no instructions were given as obviously the responsible officials in New York felt that it should be handled by the Captain who was at the scene (T. 737).

As to (F) the use of lights showing only 25 to 100 feet would make it almost an impossibility to pick up a man in the water and would also blind the lookouts so that it would be impossible to see. Anyone who is familiar with night vision can realize that it would be easier to pick up a man at sea without lights than with lights (T. 727).

As to (E) if the vessel had remained in the area until daylight the next morning, the decedent, if he were alive, would have been in the water a minimum of 24 hours as it

was reasonable to believe that he had gone overboard before daylight the day before. Furthermore, he would have drifted further with the current or set and it would have been impossible to have followed any course which would have reasonably come upon the decedent. The experts for the respondent, Captain Sheridan and Captain Umstead, testified that, in their opinion, it would have been useless to have continued the search. Even Captain Feinne, on cross examination, admitted that it would have been ridiculous to continue the search (T. 440) after nightfall on November 15, 1950.

To summarize, the Master, in turning his ship about and steaming back into its wake, did the only thing he could do. To have followed any other method of search would have been wrong. Going back into his wake, as he did, was the only means by which he could possibly hope to come upon Miller, if he were still afloat. This use of the sole and only method of search cannot be held to constitute negligence.

That the Master did not interview all 57 persons aboard the ship or request instructions from his home office did not constitute negligence. The first procedure would have consumed valuable time which should be devoted to a search as was done herein. To have requested instructions from the home office would have been an attempt to shift the responsibility and control of the situation to a person thousands of miles away. The Master is in control at a time such as this and must remain in control in order to carry out such an operation as effectively and efficiently as possible. The Master's radio-telephone conversations with the Coast Gaurd Weather Ship was agreed to by the petitioner's expert as a correct procedure and was confirmed as a correct procedure by the Court below in its decision. To have attempted to search after dark using

swivel lights, or to have stayed in the area until daylight on November 16, 1950, and then continued the search would have been futile as hereinbefore indicated.

The Master of the SS. *African Glade* did everything that a reasonable, prudent man should have done in the circumstances and nothing that he did or left undone caused or contributed, in the slightest degree, to the death of James W. Miller.

Conclusion.

There are no special, important or compelling reasons set forth in the petition for the court to grant certiorari in this case.

Respectfully submitted,

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